No. 439

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In the Supreme Court of the United States

JOHN DOOLIN, d/b/a National Novelty Company, et al.,
Plaintiffs-Appellants,

vs.

MARSHALL KORSHAK, Director of Revenue, et al.,
Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

APPELLANTS' JURISDICTIONAL STATEMENT

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Appellants appeal from the judgments of the Illinois Supreme Court rendered March 28, 1968 and May 28, 1968, on which latter date that Court denied the petition for rehearing filed by appellants and rendered the same judgment, but issued a modified opinion, both judgments holding the Illinois Leasing Occupation Tax Act and related Acts immune to appellants' contentions that those Acts offended both the Constitution of the United States and that of the State of Illinois.

OPINIONS BELOW

The opinions of the Illinois Supreme Court are not yet officially reported. They appear on that Court's Agenda 35—November, 1967, as Docket No. 40630.

A copy of the original opinion issued March 28, 1968 is attached hereto as Appendix A.

A copy of the modified opinion issued May 28, 1968 is attached hereto as Appendix B.

The opinion of the Circuit Court of Cook County, Illinois, reference to which is necessary to ascertain the arena of historical development in which the judgments by the Illinois Supreme Court were rendered and the grounds for those judgments, appears verbatim in the "Brief and Argument" filed by these appellants with the Illinois Supreme Court at pages 15 to 19, inc.

THE JURISDICTION OF THIS COURT

Statute

The jurisdiction of this Court to review this matter on direct appeal rests on 28 U.S.C., Sec. 1257 (2).

Grounds

Appellants filed a Complaint for Injunction and Other Relief on August 2, 1967, subsequently amended, which Amended Complaint, filed August 8, 1966, assailed on Federal and State Constitutional grounds the validity of the following Statutes of the State of Illinois:

Leasing Occupation Tax Act approved July 20, 1965, effective August 1, 1965 (Ch. 120, pars. 453.101-453.109, inc., Ill. Rev. Stats. 1965). Attached hereto as Appendix C.

Leasing Use Tax Act, approved July 20, 1965, effective August 1, 1965 (Ch. 120, pars. 453.121-453.140, inc., Ill. Rev. Stats. 1965). Attached hereto as Appendix D.

Municipal Leasing Occupation Tax Act (Ch. 24, par. 8-11-6, Ill. Rev. Stats. 1965). Attached hereto as Appendix E.

County Leasing Occupation Tax Act (Ch. 34, par. 409.4 (formerly par. 25.05-5, Ill. Rev. Stats. 1965). Attached hereto as Appendix F.

The offensiveness of the above statutes to both Federal and State Constitutions was specifically alleged and contended in appellants' complaint, the provisions assailed being:

Section 8, Article 1 (Commerce Clause), the Fifth Amendment, and the Fourteenth Amendment to the Constitution of the United States; Section 2 of Article 2, Sections 1, 13 and 22 of Article 4 of the Constitution of the State of Illinois. (Ill. Supr. Ct. Abst. of Rec., pp. 8-40).

The Circuit Court of Cook County, Illinois specifically passed upon these contentions, stating:

"I therefore find the Acts challenged, valid, and immune to the State and Federal constitutional objections made, I so hold." (Ill. Supr. Ct. Abst. of Rec., page 19).

The Federal and State constitutional objections were reiterated and argued in Appellants' Brief, and again orally before the Illinois Supreme Court.

The Illinois Supreme Court considered, passed upon, and held the statutes assailed valid over those Federal and State constitutional objections. (Ill. Supr. Ct. Ops. App. A and B)

Notice of appeal to this Court from the judgments rendered by the Illinois Supreme Court on March 28, 1968, and May 28, 1968, was filed with the Clerk of the Illinois Supreme Court on August 22, 1968. The statutory provision relied upon to confer this Court's jurisdiction of this direct appeal is 28 U.S.C., Sec. 1257 (2).

The cases relied upon to sustain the jurisdiction of this Court are. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250; *American Steel and Wire Co.* v. *Speed,* 192 U.S. 500; *Norton Co.* v, *Department of Revenue,* 340 U.S. 534; *Northwest Airlines* v. *Minnesota,* 322 U.S. 292; *Aero Transit v. Com'rs.,* 332 U.S. 495; *Bode* v. *Barrett,* 412 Ill. 204, 220; *Co-ordinated Transport of Ill.* v. *Barrett,* 344 U.S. 583, rehearing denied 345 U.S. 931.

STATEMENT OF THE CASE AND THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

I.

Appellants respectfully urge this Court to grant a hearing in this Court to appellants for the reason that the "Commerce Clause" of the United States Constitution has been again misconstrued by the Illinois Supreme Court. Appellants are persons engaged in Illinois as both private carriers and carriers for hire with leased vehicles in intrastate commerce. As such carriers in intrastate commerce, said appellants are, by virtue of the provisions of the Illinois Leasing Use Tax Act and the companion Leasing Occupation Tax Act, required to pay the tax levied thereby. Said Tax Acts levy a tax upon both lessors and lessees in Illinois for the privilege of leasing and using leased vehicles for the transportation of goods in *intrastate commerce*. Persons leasing similar vehicles for movement in *interstate commerce are exempted* from the taxing provisions of said Acts. Plaintiffs-Appellants complained in the Illinois courts of the invalidity of said exemption in that the said Acts of the General Assembly of Illinois do violence to the Commerce Clause of the United States Constitution. Said Acts permit some persons to lease vehicles as "rolling stock" to be used in interstate commerce free of the tax while identical or similar vehicles used as "rolling stock" in intrastate commerce are required to bear the burden of said tax. In its initial opinion in the instant case the Supreme Court of Illinois held the "rolling stock" provision of the challenged statute to relate *solely* to the locomotives, motor cars, passenger cars, or coaches, freight cars, etc., running or capable of running on tracks or rails. The Supreme Court

relied upon the term "rolling stock" as it was used in the Constitution of Illinois in Article IX, adopted in 1870. Following a Petition for Rehearing by these appellants urging the infirmity of said portion of the Supreme Court's judgment, a modified opinion issued out of that Court which omitted the Court's conclusion that the "rolling stock" exemption was limited only to rolling stock of a railroad. The Court, however, refused to strike down the unconstitutional, complete exemption found in said taxing Acts for "rolling stock" used in interstate commerce. This left the lessors and lessees of motor vehicles in intrastate commerce burdened with a discriminatory tax.

The Supreme Court of Illinois completely ignored the objection urged by the appellants in intrastate commerce concerning the unconstitutional exemption of rolling stock leased for use in interstate commerce and ignored the cited authorities of this Court. Appellants respectfully submit that it does not require extended study of these cases of this Honorable Court construing the "Commerce Clause" to immediately recognize the fact that it is not necessarily every movement in interstate commerce across State lines that is of necessity accorded blanket exemption by the Commerce Clause from local State taxes. On the contrary, the cases of this Court spell out the rule that even interstate commerce is required to pay its fair share for local privileges enjoyed. Hence, it follows from the decided cases that for the General Assembly of Illinois to tax persons who engage as lessors in the business of leasing in Illinois vehicles to lessees who will use such vehicles in interstate commerce in and out of Illinois just as lessors and lessees of intrastate vehicles are taxed would in no way transgress the Commerce Clause.

In *American Steel and Wire Co.* v. *Speed*, 192 U.S. 500, Chief Justice White of this Honorable Court indicated that the essence of the illegality depended upon whether a State's exertion of taxing power actually operated upon interstate commerce so as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. The Chief Justice indicated that State taxes may not amount to a regulation in the sense of the Constitution even though they levy a tax which remotely and indirectly affects interstate commerce. This case alone indicates the importance of determining when an actual burden upon interstate commerce is, in fact, evidenced. To tax vehicles leased for interstate movement *precisely* as that leased for intrastate movement is not offensive to the Constitution of the United States, as held by the Illinois Supreme Court in this matter.

In *Norton Company* v. *Department of Revenue*, 405 Ill. 314, the Court considered the question of whether an Illinois tax upon the use of articles by residents in the State of Illinois could or could not be the subject of a tax where the property in question moved in interstate commerce before the use. The Court therein observed that it has been said that the essence of constitutionality, as determined by the Commerce Clause, is no longer, if it ever was, determined by whether a State provision directly affects interstate commerce. It has been said that essentially the point to be considered is whether the interstate commerce is unconstitutionally "burdened" by the State regulation or tax. In resolving such a test, it has been said that constitutionality of the burden placed upon the interstate commerce is determined by looking to whether the tax causes interstate commerce to carry *more than a fair share* of the cost of the local government whose protection it enjoys. Appellants respectfully suggest that the trend of

recent Supreme Court pronouncements is based upon the foregoing concept. Valid state legislation seeks only to avoid unfair discrimination against interstate commerce. Surely while making this effort to guard against unfair discrimination against interstate commerce it becomes equally necessary to guard against unfair discrimination against the State's local commerce. It is patently unfair to make local commerce pay for the cost of local facilities whose protection is likewise enjoyed by those who are exempted from the instant tax which is challenged. *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250, again, is authority from this Court for the proposition that to require interstate commerce to assume its fair share of local taxation constitutes neither a burden nor a discrimination against such commerce in violation of the Commerce Clause.

Lessees and lessors of vehicles used in intrastate commerce are taxed under the challenged statutes while lessees and lessors of vehicles used in interstate commerce are completely exempted from the assailed tax acts. The result, we respectfully submit, is non-uniformity, and denial to the Plaintiffs-Appellants of due process of law, and the equal protection of the law, in violation of the constitutional provisions found in section 2 of Article II, section 1, Article IX, section 22, Article IV, all of the Constitution of the State of Illinois, as well as the Fifth and the Fourteenth Amendments to the United States Constitution, all of which was ignored by the Supreme Court of Illinois.

Plaintiffs-Appellants rely upon:

American Steel etc. v. *Speed,* 192 U.S. 500.

Northwest Airlines v. *Minnesota,* 322 U.S. 292, 306 (1944).

Chicago, M. & St. P. Ry. Co. v. *Westby,* 178 Fed. 691.

Hendrick v. *Maryland,* 235 U.S. 610 (1915).
Bode v. *Barrett,* 412 Ill. 204, 220 (1953).
Clark v. *Poor,* 274 U.S. 554, 577 (1927).
Aero Transit v. *Com'rs.,* 332 U.S. 495, 502-(1947).
Dixie-Ohio v. *St. Revenue Com.,* 306 U.S. 72 (1939).
Hicklin v. *Coney,* 290 U.S. 169 (1933).
Deppman v. *Murray,* 5 Fed. Supp. 661, 672, 673 (D.C. W.D. Wash., 1934).

The Court is directed to page 13 of the State's Brief in which appellees endeavor to argue in defense of the exemption of interstate leasing. The appellees rest their argument upon *Helson* v. *Kentucky,* 279 U.S. 245, which held a Kentucky use tax on an interstate carrier of fuel purchased outside of Kentucky to be a violation of the Commerce Clause. This however will not serve as good authority for sustaining the instant exemption. In the *Helson* case the Court voided that tax for it was a classical example of discrimination against interstate commerce alone. Kentucky failed to tax local carriers in Kentucky for use of such fuel and therein lay the discrimination for which that tax was held to violate the "Commerce Clause." The exemption of the Illinois lessors of interstate vehicles cannot possibly be justified upon the authority of the *Helson* case.

The Supreme Court of Illinois said in *I. B. M.* v. *Korshak,* 34 Ill.2d 595 at 606:

> "The objective of the provision seems to be to avoid conflict with the commerce clause of the constitution of the United States." (Referring to the exemption of interstate leasing).

This subject received careful consideration in the Supreme Court of Illinois in *City of Chicago* v. *Willett,* 406 Ill. 286, 409 Ill. 480, and finally in 1 Ill.2d 311, 313. The Illinois Supreme Court initially was of the opinion that the Chicago Ordinance though valid was invalid as applied to Willett

since it ran afoul of the Commerce Clause. But, that Court ultimately said, "by a subsequent opinion, the high bench reversed our judgment holding that under the circumstances of the parties * * * a tax of reasonable proportions such as the one in question not shown in fact to be a burden on interstate commerce, is not inconsistent with the Commerce Clause." (*City of Chicago* v. *Willett Co.*, 344 U.S. 574, 97 L.Ed. 333.)

Hence, we now submit it is apparent that the legislative objective which seemingly purported to avoid conflict with the Commerce Clause was in fact needless for the Highest Court has held no such conflict flows from a tax which is reasonable and has repeatedly ruled that the test is whether interstate commerce is asked to carry more than a fair share of the cost of the local government whose protection it enjoys. (See cases cited pp. 40, 41 Appellant's Brief.)

Interstate lessors and lessees based in Illinois cannot be permitted to enjoy all the protection of local government in Illinois and yet be heard to complain thereafter that a tax required of intrastate carriers for hire should not be reasonably paid by such interstate carriers for hire as well.

Remaining for consideration after admitting that this specific exemption is not truly justified by virtue of the Commerce Clause is the question whether there is factual or reasonable basis for classifying such lessees differently, and since it has not been affirmatively proven that a real and substantial difference exists, the exemption must fail.

II.

The totality and cumulative effect of the Federal and State constitutional objections to which the statutes assailed are amenable, and as contended by these appellants so patently reveals the repugnancy of those statutes to Federal constitutional essentials of valid enactments respected

and demanded by this Court that the failure by the Illinois Supreme Court to recognize this and so hold denies these appellants due process and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

III.

The criteria upon which the Illinois Supreme Court founds its authority to respect appellants' Federal constitutional objections to the statutes assailed, themselves are so novel, that their employment is obnoxious to the Fifth and Fourteenth Amendments to the Constitution of the United States because their employment effectively denies these appellants due process and equal protection of the law. This Court's attention is respectfully directed to appellants' Point VII in their Brief to the Illinois Supreme Court, and Point V in appellants' petition for rehearing where this demonstration appears.

The Illinois Supreme Court, on folio 6 of its original opinion disposes of plaintiffs' contentions (which invoke the protection and guarantees of three (3) separate provisions of the Illinois Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States), with the unprecedented sanction and approval of these Acts over such objections, by summarily directing taxpayers, upon whom these Acts, DO NOT place the burden of payment of the tax, and which Acts conceal the time at which these taxpayers will be alleviated from the payment of such tax which is "passed on" to them, "To find out for themselves by asking each lessor every time such taxpayers enter into a leasing transaction, if they are still liable to that lessor for County Leasing Occupation taxes, for which tax such taxpayers are not liable, and which tax this Court has never held can legally be passed on to them.

It is respectfully submitted that judicial approval, validity and constitutionality of Statutes has never been founded on a more unique envisionment of taxpayer demeanment.

Appellants respectfully submit that the questions presented are substantial and require plenary consideration, with briefs on the merits, and oral argument, for their resolution, and request the consideration and order of this Court to this effect.

Respectfully submitted,

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